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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 458

RENFIELD IMPORTERS, LTD., a Corporation,
Petitioner,

vs.

HARRY BRANDT, d b a University City House of Liquors, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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HARRY BRANDT, d b a University City House of Liquors, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on April 27, 1960.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit review of which is sought by this petition is reported at 278 F. (2d) 904 and is appended to this petition at pages 15-30. A prior opinion by the Court of Appeals in this case is reported at 269 F. (2d) 14 and is appended to this petition at pages 31-38. A memorandum opinion of the District Court for the Eastern District of Missouri is unreported and is appended to this petition at pages 39-43.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 27, 1960. A timely petition for rehearing or, in the alternative, for transfer to and consideration by the Court en banc was denied on July 25, 1960. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

The single question presented for review is whether, under the venue provision (Section 12) of the Clayton Antitrust Act (15 U. S. C. A., Section 22), a corporation is transacting business in a judicial district so as to be subject to suit there when its only connection with that district is that its products are sold there by wholly independent wholesalers.

STATUTE INVOLVED.

The statute involved is Section 12 of the Clayton Act, 15 U. S. C., Section 22, which provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only

in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant or wherever it may be found.

STATEMENT.

This action was brought in the District Court for the Eastern District of Missouri by eighteen retail liquor dealers doing business in St. Louis, Missouri, and vicinity, against fourteen distillers, distributors, wholesalers and retailers of liquor for an injunction and treble damages for alleged violations of the Sherman Act, the Clayton Act and the Robinson-Patman Act. Service on petitioner was made in New York City. The complaint alleges that the defendants created a monopoly in the retail liquor business and that they conspired to monopolize and have monopolized the trade and commerce in the retail liquor business and in the retail distribution of liquor in the City of St. Louis, Missouri, and vicinity.

Petitioner and two other defendants filed motions to dismiss for improper venue and for lack of jurisdiction over the person. These motions were duly argued, briefed and submitted, and the District Court thereafter sustained the motions and dismissed the case as to the petitioner and the two other defendant corporations. The District Court (Judge Roy W. Harper) held that the petitioner and the other two defendants were not transacting business in the Eastern District of Missouri within the meaning of Section 12 of the Clayton Act and so were not subject to suit there. (See Memorandum Opinion of the District Court appended at pages 39-43.)

An appeal was taken from the orders of dismissal, but the United States Court of Appeals for the Eighth Circuit

(Chief Judge Gardner wrote the opinion and was joined by Judges Johnsen and Vogel) dismissed the appeal. **Brandt v. Renfield Importers, Ltd.**, 269 F. (2d) 14. The ground for dismissal was that the alleged cause of action was a single claim against multiple defendants which did not permit an interlocutory appeal from the orders dismissing the cause as to only three of the fourteen defendants. Upon remand, respondents dismissed their cause of action without prejudice as to all defendants except the petitioner and the two other defendants which had moved to dismiss. On the same day, the District Court issued an amended order striking from its previous order, which sustained the motions to dismiss, any reference to the finding of the District Court that the respondents had several claims and not one claim. The District Court ordered that the previous order otherwise remain in full force and effect as originally entered.

Respondents then took an appeal from the amended order and sought review of the amended orders of dismissal as to petitioner and the other two defendants. The United States Court of Appeals (Judge Woodrough wrote the opinion and was joined by Judges Gardner and Blackmun) reversed. It held that the petitioner and the other two defendants were transacting business within the meaning of Section 12 of the Clayton Act. Petitioner now seeks review of the judgment of the Court of Appeals so holding.

The facts upon which the judgment is based are undisputed. Petitioner is incorporated under the laws of New York. Its executive offices are located in the City of New York, and all stockholders' and directors' meetings are held in that city. Petitioner is engaged in the business of distributing various kinds of alcoholic beverages throughout the United States. It has a general office in New York City and regional offices in Chicago, San

Francisco, Atlanta and Los Angeles. It maintains warehouse stocks of its products in New York City, Chicago, San Francisco and Los Angeles (R. 33-35).

Petitioner is not now qualified nor has it ever been qualified to do business in the State of Missouri. It has no office, warehouse, plant, distillery or any kind of business operation, or any place for any kind of business operation, within the State of Missouri. It does not maintain an inventory or stock of goods in the state, owns no property of any kind in Missouri, and has no bank account, transfer agent, registrar or registered agent for service of process in Missouri. It is not listed in any telephone directory in Missouri; its name does not appear upon the door of any office or directory of any building in the state; and no salesman, agent or employee of petitioner has been in the state for five years prior to the filing of this suit (R. 33-35).

Petitioner conducts no retail sales in Missouri. It does sell its products to two wholly independent wholesalers engaged in doing business in the Eastern District of Missouri. These wholesalers are Conrad, Inc., and Paramount Liquor Company, Inc., and these wholesalers were originally named as defendants in respondents' complaint. The sale of petitioner's products to these wholesalers are made pursuant to customers' orders forwarded by these wholesalers to petitioner's Chicago office or else to petitioner's New York office where they are received and accepted. Petitioner's products are sold and shipped exclusively F. O. B. its warehouse, foreign port, or the distillery where the products are made or distilled, all of which are located outside of the State of Missouri. Thus, title to all such products so sold passes to the purchasers before such products enter the State of Missouri and such sales are consummated outside of the State. Petitioner has a Missouri outstate liquor solicitor license from the State of Missouri which authorizes it to sell to wholesalers within the State

of Missouri, but petitioner has not taken advantage of this license since all of its sales are made outside of the state. Petitioner has no financial interest in, and exercises no control over, the operations of either of the wholesalers and the only relationship that exists between petitioner and its wholesalers is that of seller and buyer (R. 33-35).

In 1956, petitioner sold $1,580,818.60 worth of goods to these two wholesalers. This represented two per cent of its total volume of sales. In 1957, the year in which this suit was filed, total sales to these wholesalers were $1,313,947.98, or 1.72 per cent of petitioner's total sales (R. 35, 36, 41).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

This is a treble-damage action brought for violation of the antitrust laws of the United States. Section 12 of the Clayton Act (15 U. S. C., Section 22) contains the venue provision relating to actions brought under the antitrust laws against a corporation. That section provides that such an antitrust action may be brought against a corporation, "not only in the judicial district whereof it is an inhabitant, but also in any district **wherein** it may be found or **transacts business.**" (Emphasis supplied.) It is conceded that petitioner is not an inhabitant of the Eastern District of Missouri and also that petitioner may not be found in that district. The only question is whether, under the undisputed facts, petitioner "transacts business" within the district.

1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The Court of Appeals has decided that a corporation is transacting business in a judicial district even though its only connection with that district

is that its products are sold there by wholly independent wholesalers. Petitioner is a corporation incorporated under the laws of New York and has never been qualified to do business in Missouri. It has no inventory or stock of goods in Missouri and owns no property of any kind in that state. It has no bank account or agent of any kind in Missouri. None of its salesmen or employees ever come into the state. Petitioner does sell its products to two wholesalers who are located in Missouri. These sales, however, do not take place in Missouri but are consummated outside the state since they are F. O. B. petitioner's warehouse and other points outside Missouri.

The Court of Appeals placed reliance on the fact that the sales to these two wholly independent wholesalers amounted to over one million dollars a year. But the Court overlooked the requirement of Section 12 of the Clayton Act that the defendant corporation must transact business "in" the district in which suit is brought. These sales were not transacted in the Eastern District of Missouri. They were all transacted outside of the State of Missouri.

The Court also indicated that petitioner's wholesalers should be considered agents (Appendix at pages 27, 30) even though the undisputed facts show that these wholesalers were wholly independent, that they had no franchise or license agreement or other contractual arrangement with petitioner, and that the only relationship with petitioner was that of buyer and seller (R. 34, 35). As Justice Brandeis, speaking for a unanimous Court, has pointed out, a corporation may have contact with another forum "through an independent agency without subjecting itself to jurisdiction." **Cannon Mfg. Co. v. Cudahy Packing Co.**, 267 U. S. 333, 336 (1925). Moreover, independent contractors, and even subsidiary corporations, are not agents for the purpose of venue or jurisdiction in the absence of some

affirmative evidence that an agency relationship exists. **Cannon Mfg. Co. v. Cudahy Packing Co.**, supra. Here there is no evidence of an agency relationship at all.

The Court below also seemed to place some reliance upon the fact that petitioner has taken out a Missouri outstate liquor solicitor license from the State of Missouri which authorizes it to sell to wholesalers **within** the State of Missouri. Mo. Rev. Stat., Section 311.050 (1949).[1] The fact of the matter is, however, that petitioner has never taken advantage of this license because all of the sales by petitioner have been consummated outside of the state. The authorities are clear that the existence of a license authorizing a foreign corporation to do business in a forum does not constitute the doing of business in that forum. **Chipman, Ltd. v. Thomas B. Jeffrey Co.**, 251 U. S. 373 (1920); **Stephens v. Richman & Samuels, Inc.**, 118 F. (2d) 1011 (C. A. 5, 1941); **Morris & Company v. Skandinavia Ins. Co.**, 81 F. (2d) 346 (C. A. 7, 1936). These cases all clearly state that the power to engage in business in the forum by virtue of a license does not constitute the doing of business. One must look at the actual activities of the corporation and not to whether that corporation has the power to carry on those activities.

Thus, the holding of the Court below in this case stands solely on the proposition that a corporation is transacting business in a forum if wholesalers buy that corporation's products outside the state and then bring those products into the state for resale. Such a holding constitutes a landmark decision in antitrust litigation. Venue is one

[1] That statute provides that it "shall be unlawful for any . . . corporation to manufacture, sell or expose for sale *in this state* intoxicating liquor . . . in any quantity without taking out a license." Emphasis supplied. There is no evidence in the record that petitioner sells liquor in the state nor is there any evidence that it makes or is required to make any reports to state officials under this law or any regulation adopted pursuant to the law.

of the most important and troublesome facets of an antitrust case. The decision by the Court below means that a defendant corporation, whether large or small, can now be sued in any forum in which its products are sold by others in substantial quantities. This petitioner submits that such a consequence was not intended by Congress when it enacted Section 12 of the Clayton Act and that this decision goes far beyond the prior decisions of this Court (See pages 10-13, infra).

It is submitted that serious consideration should be given to the consequences of subjecting a party to the jurisdiction of the courts of a foreign state simply because he sells his products to a purchaser who is doing business in the forum and because the goods are shipped into the forum. Suppose that a corporation conducts all of its business in one state, that all of its products are sold there, but that they are shipped to purchasers in other states. Is it to be subjected to the courts of every state into which its goods are shipped? Certainly neither the corporation nor its legal adviser ever suspected any such consequences until now. If jurisdiction follows a party's products, the only way to exercise one's privilege of refusing to submit to the jurisdiction of a foreign court is to sell only in the state in which a person does business. This would seriously curtail commercial activities and would be contrary to modern economic trends in this country.

There has been no decision by this Court on the important question of venue in antitrust cases since 1948. See **United States v. Scophony Corporation**, 333 U. S. 795. Since that time the lower federal courts have reached hopelessly conflicting results on identical fact situations in attempting to determine whether a corporation transacts business within a particular district. For cases similar to the one at hand, compare **Austad v. United States Steel Corp. et al.**, 141 F. Supp. 437 (N. D. of Cal., 1956), and

Dazians, Inc., v. Switzer Bros., 111 F. Supp. 648 (N. D. of Ohio, 1951), with **Green v. U. S. Chewing Gum Mfg Co.**, 224 F. (2d) 369 (C. A. 5, 1955), and **Sunbury Wire Rope Mfg. Co. v. U. S. Steel Corp.**, 129 F. Supp. 425 (E. D. of Pa. 1955). Compare also **Noerr Motor Freight, Inc., v. Eastern Railroad Presidents Conference**, 113 F. Supp. 737 (E. D. of Pa., 1953), and **Reid v. University of Minnesota**, 107 F. Supp. 439 (N. D. of Ohio, 1952), with **Exhibitors Service, Inc., v. Abbey Rents**, 135 F. Supp. 112 (W. D. of Mo., 1955), and **Naifeh v. Ronson Art Metal Works**, 111 F. Supp. 491 (W. D. of Okla., 1953). Clarification by this Court of the concept of transacting business is necessary in order to resolve the conflicts which have arisen.

Because of the importance of venue in antitrust litigation, because the lower courts have reached inconsistent results in venue cases since this Court's last decision on this matter in 1948, and because the decision of the Court below has serious implications and drastically extends the concept of venue in antitrust cases, it is submitted that the Court of Appeals has decided an important question of federal law which has not been, but which should be, settled by this Court.

2. The decision by the Court below is erroneous and conflicts with the applicable decisions of this Court. The corporate defendant in an antitrust suit may be sued "in any district **wherein** it '. . . transacts business." Section 12 of the Clayton Act (15 U. S. C. A., Section 22). (Emphasis supplied.) Thus, before a corporate defendant can be subject to suit in a judicial district, it must be transacting business **in** that district.

Here, the undisputed facts show that petitioner not only never transacted any business **in** the district, it has no contact whatsoever in the district. It has no office, warehouse, plant, distillery, or any kind of business operation of any

kind within the State of Missouri." It has no property of any kind and no bank account of any kind in the state. It has no agents, salesmen or employees of any kind in Missouri. It sells its products to two wholesalers which are located within the district, but these sales are made outside of the judicial district and not within it. The wholesalers to whom petitioner sells its products are in no way controlled by petitioner nor has petitioner any financial interest in them. The only relation that exists between petitioner and its wholesalers is that of a seller and buyer. Under such a state of facts it can hardly be said that petitioner is transacting business in the Eastern District of Missouri.

The leading case on the question of venue in antitrust cases is **Eastman Kodak Co. of New York v. Southern Photo Materials Co.**, 273 U. S. 359 (1927). The Court held in that case that Section 12 of the Clayton Act provides that a "corporation is engaged in transacting business in a district, within the meaning of this section, in such sense as to establish the venue of a suit—although not present by agents carrying on business of such character and in such manner that it is 'found' therein and is amenable to local process—if in fact, in the ordinary and usual sense it 'transacts business' **therein** of any substantial character." **Id.** at page 373. (Emphasis supplied.) The Court pointed out that in **Peoples Tobacco Co. v. American Tobacco Co.**, 246 U. S. 79 (1918), it was held that a corporation is "found" within a district only if its officers and agents reside in the district and are carrying on the business of the corporation there. The Court in **Eastman Kodak Company** held that Section 12 of the Clayton Act altered the venue requirements by the addition of the words "transacts business" so that even if a corporation had no officers or agents residing and carrying on business in the district, it still was subject to the venue provisions of Section 12 if it advertised its goods in the

district or sent its soliciting agents into the district even if they later withdrew. **Id.** at pages 371-372. The Court went on to hold that under the facts of that case, since Eastman Kodak Company sent its salesmen and demonstrators into the district for the purpose of soliciting orders and promoting Eastman Kodak Company's business, it was transacting business in the district within the meaning of Section 12.

The **Eastman Kodak Company** case properly interpreted Section 12 of the Clayton Act to mean that a corporation is transacting business in a district if it sells its products in the district, advertises and promotes its products in the district, sends its salesmen and demonstrators into the district, or in some manner comes into the district for business purposes. The Court below has misconceived and distorted the holding of **Eastman Kodak** and in so doing has rendered an opinion which conflicts with that decision. Here, there were no sales of petitioner's products in the district; there was no advertising by petitioner in the district; there were no salesmen, demonstrators or employees of any kind of petitioner's in the district; there was no activity of any kind by petitioner in the district. None of the essential facts necessary to a finding that petitioner was transacting business in the district are present.

In **United States v. Scophony Corporation**, 333 U. S. 795 (1948), this Court reiterated the principles announced in **Eastman Kodak** and pointed out that "the practical, everyday business or commercial concept of doing or carrying on business of any substantial character" is the test of venue. **Id.** at page 807. The Court held in that case that Scophony Corporation, which had its agents in the judicial district in which suit was brought and which, through its agents, conducted continuous and intensive negotiations leading up to a series of agreements, was transacting business of a substantial nature and was

therefore subject to suit in that district. Thus, in both **Eastman Kodak** and **Scophony** the defendant corporations had agents in the district and were transacting business in the district under any business or commercial meaning of that term. In this case, petitioner simply was not in the district in any way. The fact that two wholly independent wholesalers bought petitioner's products outside of the district and then brought them in the district where they sold them certainly does not constitute the transaction of business in the district **by the petitioner**. The holding by the Court of Appeals to the contrary is erroneous and conflicts both with **Eastman Kodak** and with **Scophony.**

The decision by the court below also conflicts with the holding of this Court in **Cannon Mfg. Co. v. Cudahy Packing Co.**, 267 U. S. 333 (1925). As previously pointed out, page 7, supra, the Court of Appeals stated that the two independent wholesalers which sold petitioner's products should be considered petitioner's agents for venue purposes in spite of the fact that there is not a scintilla of evidence showing agency and in spite of the fact that the undisputed facts disclose that these wholesalers are wholly independent wholesalers and that the only relationship between them and petitioner is that of buyer and seller (R. 34, 35). In the **Cudahy Packing Company** case, this Court pointed out that for purposes of venue or jurisdiction, an agency relationship cannot be assumed but must be shown by affirmative evidence and that even a wholly-owned subsidiary corporation cannot be assumed to be the agent of the principal corporation in the absence of affirmative proof that such is actually the case. Petitioner submits that this Court should review the decision below in order to correct the conflict which exists between the Court of Appeals decision and the holdings of this Court in **Cudahy Packing Company**, **Eastman Kodak**, and **Scophony**.

CONCLUSION.

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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APPENDIX.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 16,359

Harry Brandt, d/b/a University City House of Liquors, et al., Appellants,

v.

Renfield Importers, Ltd., a Corporation, et al., Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[April 27, 1960.]

Before Gardner, Woodrough and Blackmun, Circuit Judges.

Woodrough, Circuit Judge.

This action was brought by eighteen retail liquor dealers doing business in St. Louis, Missouri, and vicinity, against fourteen distillers, distributors, wholesalers, and retailers of liquor for injunction and treble damages for alleged violations of the Sherman Act, the Clayton Act, and the Robinson-Patman Act.

The complaint alleged that the defendants created a monopoly in the retail liquor business in violation of the

anti-trust laws; that they had conspired to monopolize and have monopolized the trade and commerce in said liquor and the retail distribution thereof in St. Louis, Missouri, and vicinity.

The case was heretofore before this Court on an appeal by the plaintiffs from three orders entered by the District Court on November 20, 1958, which severally dismissed the case as to three defendant corporations, Renfield Importers, Ltd. (referred to as Renfield), James B. Beam Distilling Company (referred to as Beam), and Julius Wile Sons and Company (referred to as Wile), for improper venue and lack of jurisdiction over the person.

The plaintiffs contended on that appeal that the three defendants were "transacting business" in the Missouri judicial district where the suit was brought so that the venue was proper and as they were properly served at their principal places of business, the jurisdiction of the persons was complete. The three orders then appealed from each contained a provision and direction for the entry of a final judgment of dismissal of one of the three defendants in accordance with Rule 54(b) of the Federal Rules of Civil Procedure. This Court was of the view that the action as disclosed by the complaint did not involve multiple claims within the purview of the Rule but rather a single claim of conspiracy joined in by all defendants and that the orders dismissing the three defendants were not final orders and therefore not appealable. It accordingly dismissed the appeal without consideration of the merits of appellants' contentions and remanded the case for further proceedings. 269 F.2d 14.

After the mandate of this court was entered in the District Court and on August 6, 1959, the plaintiffs entered voluntary nonsuit as to all the defendants in the case excepting Renfield, Beam, and Wile, and with approval of the Court, dismissals without prejudice were entered as to

all defendants except the three. On the same day the Court in finally disposing of the action as to the remaining three defendants entered an order in which it referred to the mandate of this Court and to the three orders of dismissal which it had entered on November 20, 1958 in favor of the three defendants and after ordering that those former orders be amended so that the provision and direction based on Rule 54(b) which it had included in those orders be stricken from them, ordered "the aforesaid orders and each of them in all other respects to remain in full force and effect as heretofore entered."

The plaintiffs have taken this appeal from that order of August 6 to obtain reversal of the dismissals of the case as to the three defendants and they contend that the Court erred in sustaining said defendants' respective motions to quash service of process and to dismiss the three defendants for improper venue and lack of jurisdiction of the person. They insist that each of the three defendants is transacting business in the Eastern Judicial District of Missouri within the meaning of 15 U.S.C.A. § 22 (§ 12 of the Clayton Act) and that venue is proper as to each and service at their respective places of business outside of Missouri where they were "found" was sufficient.

The appellee Beam has filed a motion to dismiss this appeal on the ground that the order appealed from is not a final order but we do not find the motion to be meritorious. Although the order of the District Court of August 6, 1959 does not repeat the express words of dismissal that were contained in its previous three orders of November 20, the reference the Court made to those orders and the declaration that the orders and each of them (as amended) were "to remain in full force and effect as heretofore entered" left no ambiguity or uncertainty about the Court's final decision and judgment that the three defendants were not transacting business in the Missouri judicial district and that the case against them was dis-

missed for that reason. The entry of the order of August 6th afforded the plaintiffs their first opportunity to take a valid appeal from the ruling and order of the District Court dismissing the three defendants and they promptly filed Notice of Appeal. The Notice describes the orders referred to therein which are continued in effect thereby and clearly identifies the proceedings and judgment which the appellants claim to be erroneous. It establishes this Court's jurisdiction to review the dismissals.

The only question of merit in this appeal is whether the District Court erred in holding that the Renfield, Beam, and Wile corporations were not "transacting business" in the Missouri judicial district within the intendment of § 12 of the Clayton Act, 15 U.S.C.A. § 22. That section provides:

> Any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

The District Court in its opinion (unreported) briefly related the facts relative to the issue as they had been proved without dispute by affidavits of the officers and employees of the three defendants and counsel for appellants have not departed from but have somewhat amplified the Court's statement of facts in accord with the evidence and without dispute.

All three of the appellees are "foreign corporations" as to Missouri, the principal offices of Renfield and Wile being in New York, N. Y. and that of Beam being in Chicago, Ill. Each of them was served with process at its principal office. Each of them had an outstate liquor license for and issued to it by the Supervisor of Liquor

Control of Missouri pursuant to § 311.060(6). The cost of the licenses is $250.00 annually. § 311.180(5).

As to the Beam Company. Its selling operations are centered at its main office in Chicago and it has no branch office of any kind in Missouri. It has selected and sells and ships its products to only two licensed distributors in the Missouri district, namely Conrad, Inc., and Manhattan Distributing Co., both of St. Louis, in neither of which does it have any financial interest. It receives its orders for Beam liquors from those distributors at its Chicago office and rejects them or accepts them and makes all deliveries against those accepted by delivering to carriers at its distillery or rectifying plant at Clarmont, Kentucky, f.o.b. that plant, thereby passing title to the goods in Kentucky. It has no stock of merchandise in warehouses or otherwise in Missouri, and no real or personal property there. It maintains a checking account in a St. Louis bank and has there pledged collateral for a loan. Deposits and checks to and from the account are sent from Chicago, where all advertising also is planned and prepared. Beam employs a detail man on a straight salary who resides in the district but has no office or company automobile or Beam stationery with his name on it, but visits retailer-customers of the distributors not on any regular schedule and without any incentive compensation based on sales. He carries no order blanks, has no authority to make sales, or to make adjustments, collections, or credits, and his sole function is promotional in nature, namely, to stimulate interest in Beam's products and to persuade retailers handling Beam's products to give them proper shelf space and display. He has no stock of samples or inventory. He is occasionally requested to make notations of retailer's requisitions for Beam products and relays such requests to Beam's two distributors. Beam's vice president, Mr. Gertz, supervises the sale of Beam's products to distributors in thirteen states—calling on the

distributors at irregular intervals—averaging once every other month on those in Missouri—not for the purpose of taking orders but if given an order by a distributor he transmits it to Beam's office at Chicago for acceptance and processing. Beam is not qualified under the general corporation statute to do business in Missouri as a foreign corporation and has not designated an agent for service of process there. No officer, agent, employee, or director of Beam maintains an office in the district and no officer or director resides therein and no stockholders' or directors' meeting has ever been held there. In 1957 Beam sold $446,000.00 worth of its products to its distributors in the Missouri district of suit, which was 0.7% of all Beam's sales in that year.

As to Renfield. In 1956 Renfield Importers, Ltd., sold $1,580,818.60 worth of goods to its distributors in the district of suit. In 1957, it sold $1,313,947.98 worth of its products in this district, all of which was to the two wholesalers in the district, namely, Conrad Inc., and Paramount Liquor Company, Inc., who were Renfield's distributors.

During 1956, two percent of its total volume was done in St. Louis and St. Louis County. In 1957, 1.72 percent of its case total sales were shipped into the City and County of St Louis.

Jack S. Birnbaum, vice president of Renfield, in his affidavit filed on behalf of said defendant, states that Renfield is incorporated under the laws of New York. It has never been qualified to do business in Missouri. It is engaged in the business of distributing various kinds of alcoholic beverages throughout the United States. The sale of its products is conducted through its general office in New York City and regional offices in Chicago, San Francisco, Atlanta, and Los Angeles. Renfield sells its products to wholesalers, state liquor control commissions,

and to airlines, railroad, and other common carriers. It has no office, warehouse, plant, distillery, or any kind of business operation or any place for any kind of business operation within the State of Missouri. It does not maintain any inventory or stock of goods in this district, owns no property of any kind in Missouri; has no bank account, no transfer agent, registrar or registered agent for service of process in Missouri, has not designated anyone to act for it in Missouri. It is not listed in any telephone directory in Missouri, its name does not appear upon the door of any office or directory of any building in Missouri. It maintains no salesman, agent, or employee of any kind in Missouri. It sells its products exclusively to two wholesalers doing business in the district, to-wit, Conrad, Inc., and Paramount Liquor Company, Inc. Renfield has no financial interest in and exercises no control over the operations of any of said wholesalers. Title to products shipped to the wholesalers passes before delivery to Missouri.

Renfield's products are sold to its distributors in Missouri pursuant to customers' orders forwarded by the wholesalers to Renfield's Chicago office which in turn transmits them to the New York office where they are received and accepted, or forwarded by the wholesaler directly to the New York office.

Renfield's products sold pursuant to such orders are sold and shipped exclusively f.o.b. its warehouse, or foreign port of the distillery where the products are made or distilled, all of which are located outside of Missouri.

Renfield employs a Division Manager who operates out of its regional office in Chicago and is engaged in goodwill promotional activities in Minnesota, Indiana, North Dakota, South Dakota, Nebraska, Kansas, and formerly in Missouri, but neither such Division Manager nor any other employee has come into the Eastern District of Mis-

souri or conducted any business activities there for about five years prior to the commencement of this action.

It has a Missouri Outstate Liquor Solicitor's License issued by the State of Missouri, which authorizes it to sell its products only to wholesalers, and not to retailers within the State of Missouri.

The executive offices are located in New York, N. Y., and stockholders' and directors' meetings are held there. The corporate books and records are kept there. The company maintains warehouse stocks of its products in New York City, Chicago, San Francisco, and Los Angeles.

As to Wile. Julius Wile Sons & Co., Inc., did $142,000.00 in sales in this district in 1957. The principal office of the Julius Wile Company is in New York; its other place of business is a plant in New Jersey. It sells to only two dealers in Missouri. All of the Julius Wile liquors which go to retailers in the Eastern District of Missouri are distributed by Pioneer Liquor Company, Inc. There are two ways these distillers sell to their wholesalers. In one the distiller pays the tax and sells at the price plus the federal tax. The other is to sell in bond, just pay for the products, and then when they get the product out of bond, they pay the government tax directly.

The sales are made f.o.b. New York and New Jersey. The Julius Wile Co. employs Richard D. Ruane, who resides in St. Louis County, to promote good will, and consumer and customer acceptance of Julius Wile's products, in Missouri, Kentucky, Kansas, and part of Illinois. Pioneer distributes Wile's products in the Eastern District of Missouri and Central States distributes Wile's products in the Western District of Missouri. All sales of Wile's products to retailers and others in the State of Missouri are made either by Pioneer or by Central States.

All orders by Pioneer or by Central States for Wile's products intended for re-sale in Missouri are forwarded to Julius Wile's offices at New York, either directly or through Ruane, by mail, telephone, or telegraph; the products so ordered are shipped to the respective places of business of Pioneer or Central States in the State of Missouri, as the case may be, f.o.b. New York, New Jersey, or foreign port. Pioneer and Central States are billed for all such products by, and make payment directly to, Julius Wile in New York by mail.

Ruane's duties in the district of suit are to maintain contact with Pioneer and Central States, to suggest methods of promoting good will toward, and consumer and customer acceptance of Wile's products. He does not carry order blanks. He has no authority to make or modify any contract with any wholesaler, distributor, retailer, person, firm, or corporation in the Eastern District of Missouri; he does not approve credits, nor make collections from Pioneer or Central States nor any customer of Pioneer or Central States.

In 1957, approximately 1½% of Wile's products were sold by Pioneer in the Eastern District of Missouri. Wile maintains no stock of goods or inventory in Missouri, does not own or rent any property in Missouri. Ruane is the only employee of Wile in Missouri. He does not maintain an office or place of business in connection with his employment by Wile: Wile is not listed in any telephone book, nor on any door or building directory; Ruane is not listed; his salary and expense account are paid by check issued in New York and mailed to him in Missouri; he is required to make periodic visits throughout his territory in Missouri, Kentucky, Kansas, and part of Illinois. He does not spend more than fifty percent of his working time in connection with his duties in the Eastern District of Missouri.

Richard L. Blum, Jr., as President and Director, made an affidavit on behalf of Julius Wile Sons & Co., Inc., stating Wile is incorporated under the laws of New York, has never qualified to do business in Missouri; that Wile is duly licensed under § 311.180(6) of the Revised Statutes of Missouri, 1949, as an out-of-state corporation to offer intoxicating liquors for sale only to or through duly licensed wholesalers in the State of Missouri. The company makes no retail sales in this district. The company has no interest in either Pioneer or Central States.

The sales Wile made to distributors in the district in 1957 amounted to $142,000.00.

All of the enumerated details of transacting business that the appellees do not engage in in Missouri are stressed by them to support their contention that they do not transact any substantial business in the district. The record clearly indicates, however; that in supplying their liquor to the district of suit they do not offend in any respect the requirements of the Missouri Liquor Control Law, R. S. Mo. 1949 Ch. 311. The appellants do not claim that the appellees have "agents" in Missouri directly carrying on the sale of appellees' products but their claim is that when appellees' business of selecting certain distributors in the district of suit and of selling their brands of liquor and causing them to be transported into the district to those distributors for distribution there "is judged in its totality" it must be concluded that they each do transact some substantial business in the district of suit. **Exhibitor's Service v. Abbey Rents**, 135 F.Supp. 112. They contend that each of the appellees is transacting business in the district in such a sense as to establish the venue of the suit there although not present by agents carrying on business in such character and in such manner that each appellee is found therein, or is there amenable to local process—because each in fact in the ordinary and usual business or commercial sense transacts business

there of substantial character. **Eastman Kodak Co. v. Southern Photo Co.**, 273 U.S. 359. Appellants refer to the declaration of the Supreme Court concerning venue in antitrust cases in **United States v. Scophony Corporation**, 333 U.S. 795, that "the practical, every day business or commercial concept of doing or carrying on business of any substantial character became the test of venue" and insist that the business of appellees fully meets that test. As particulars in which the business of appellees meets the test, the appellants point to (1) appellees' taking out licenses in the state and acting under them by selecting and dealing with certain wholesalers in the district as their exclusive vendees and distributors there and planning and providing advertising for solicitation of sales by and through them; (2) by maintaining their close, continuous, day-to-day business relations with their distributors, they in practical concept are transacting liquor business in the district; (3) the volume of the business of each appellee in the district is substantial.

(1) The Missouri Liquor Control Law prescribes the taking out of a license as a prerequisite to selling or offering for sale liquor in the state (§ 311.050) and the

> issuance of licenses to non-residents of Missouri or to "foreign" corporations for the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of intoxicating liquors to, by, or through a duly licensed wholesaler within this state

of Missouri is expressly sanctioned by § 311.060(1). § 311.180 provides that:

> No corporation shall sell or offer for sale intoxicating liquor within this state or solicit orders for the sale of intoxicating liquor within this state without procuring a license from the supervisor of liquor control authorizing them so to do. For such license there shall be paid to and collected by the director of rev-

> enue charges as follows: * * * (6) For the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of intoxicating liquors of all kinds to, by, or through a duly licensed wholesaler within the state the sum of two hundred and fifty dollars.

Penalities are provided for violations by § 311.880.

A main object of Missouri's Liquor Control Law is the regulation of the peculiar traffic in the state and the issuance of licenses to the several classes of liquor dealers that take part in it is an important means to that end. The taking out of liquor licenses by appellees identifies them with the traffic in the state and subjects them pro tanto to the state's regulation. The requirement that they report all the sales they are making to and through their distributors in the district establishes direct and continuing transactions with the state officers as an integral part of their business operation. It certainly was not any matter of mere form or ceremony. On the contrary, it constitutes a transacting of business of far reaching importance related to all sales of their brands of liquor made for distribution in the district.

(2) Of course, it is not to be considered in isolation. As a closely related matter, appellees have each selected two licensed Missouri wholesale liquor dealers to distribute all of the liquor of their brands that is shipped into the district. The liquor control law prohibits the foreign corporations from setting up places of business and selling within the state. But it is not the object of the law to exclude appellees' brands, only to stringently regulate the traffic. When the foreign corporation makes its selection of only one or two wholesaler dealers to be identified with its brands and to handle all its products in the district, perhaps for long periods of time, that also is a serious business transaction. The record does not include the contracts between appellees and their distributors, but it

is evident that the relationships are close, intimate, and of long standing, and cover by expression or implication much more than mere isolated bargains of sale of such and such liquor at such and such a price. Beam sends its vice president and Wile sends an employee into the district to maintain personal good will contacts with the distributors, but Renfield has such relations with its distributors to which its sales amounted to $1,580,818.10 in 1956 and $1,313,947.98 in 1957 that it does not need to and does not send any employee into the district to call upon them.

Appellees stress that their distributors are independent contractors and such they may appear to be in the technical common law sense. But they are not independent like a casual customer would be who occasionally makes a purchase from a vendor. On the contrary, they are selected sole and exclusive distributors who apparently perform for the appellees every function of distributing appellees' products that agents hired and paid for the purpose could accomplish.

Although appellees have not presented the contracts covering their relations with their distributors, it is not to be assumed that exclusive distributorships which include the opportunity to sell in the important market of St. Louis and vicinity such great amounts of standard, nationally advertised goods as those here involved are entered into without some obligation express or implied. Appellees show that their distributors perform their functions in order to earn a margin of profit between costs and sales instead of wages, but there is no indication that appellees are not free to select other distributors in place of the present ones if they are so minded. We think that in every day business conception the district of suit served with appellees' products as it is, would be sharply contrasted with a district where appellees' products were not for sale or obtainable and where appellees transacted no

business. The relations of the appellees with their distributors is too close and continuous for all the transacting of the business to be attributed in common understanding to the distributors and none to the appellees.

Again, advertising according to plan is a most important factor in the nationwide sales of the many millions of dollars worth of their products annually by appellees. They plan and supply the advertising in the district of the suit pursuant to the express provisions of their license from the state. It constitutes a costly and serious transacting of business and affects the sales so directly that it cannot be disregarded in judging whether in the totality of their operations the appellees transact business in the district.

(3) The large amounts of the sales made in 1957, $1,313,947.98 by Renfield, $446,000.00 by Beam, and $142,000.00 by Wile demonstrate that the business transacted was very substantial. That the sales constituted a very small fraction of the business carried on in all the districts throughout the country by each of the three appellees (1.72% as to Renfield, 0.7% as to Beam, and 1.5% as to Wile) is immaterial. **Green v. U. S. Chewing Gum Mfg. Co.**, 224 F.2d 369, **Sunbury Wire Rope Mfg. Co. v. U. S. Steel Corporation**, D.C.E.D. Pa., 129 F. Supp. 425. But the amounts sold reflect the systematic, continuous carrying on of the business and the continuity of conduct and relationship between the suppliers of the goods and the distributors of them indicates cooperation and participation of both in transacting business in the area.

The appellees describe their nationwide sales as made to wholesalers and distributors in the different states and press the doctrine of independent contractor to the point that it might be concluded that they do not transact business in any state except at their home offices. But we think that position is contrary to the teaching of **Eastman Kodak Co. v. Southern Photo Materials Co.**, 273 U.S. 359,

Santa Cruz Fruit Packing Co. v. Labor Board, 303 U.S. 453, **Green v. U. S. Chewing Gum Mfg. Co.**, 224 F.2d 369, **Sunbury Wire Rope Mfg. Co. v. U. S. Steel Corporation**, 129 F.Supp. 425, **United States v. Scophony Corporation**, 333 U.S. 795, **Exhibitors Service Inc. v. Abbey Rents et al.**, 135 F.Supp. 112, **Naifeh v. Ronson Art Metal Works**, 111 F.Supp. 491, **Jeffrey-Nichols Motor Co. v. Hupp Motor Corp.**, 46 F.2d 623, **Abrahams v. Bendix Home Appliances**, 96 F.Supp. 3, **Austad v. United States Steel Corporation**, 141 F.Supp. 437, **Yonce v. Miners Memorial Hospital Association**, 161 F.Supp. 178.

No point has been made concerning the service of process that was had upon the appellees if they were in fact transacting substantial business in the district of suit. The service was in the districts where they were inhabitants and were found. § 12 of the Clayton Act, 15 U.S.C.A. § 22.

The appellees have cited the following as illustrative cases in which a corporation's activities in a district were found not to constitute "transacting business": **Winkler-Koch Engineering Co. v. Universal Oil Products Co.**, 70 F.Supp. 77; **Lechler Laboratories v. Duart Mfg. Co.**, 35 F.Supp. 839; **Schiller v. Mit-Clip Co., Inc.**, 180 F.2d 654; **Midwest Fur Producers Assn. v. Mutation Mink Breeders Assn.**, 102 F.Supp. 649; **Seaboard Terminals Corp. v. Standard Oil Co. of N. J.**, 104 F.2d 659; **Reid v. University of Minnesota**, 107 F.Supp. 439; **Austad v. United States Steel Corp.**, 141 F.Supp. 437; **Hampton Theatres, Inc. v. Paramount Film Distributing Corp.**, 90 F.Supp. 645; **Windsor Theatre Co. v. Loew's Incorporated**, 79 F.Supp. 871; **Commonwealth Amusement Enterprises, Inc. v. Colonial Theatres Co., Inc.**, 79 F.Supp. 763.

None of these cited cases appear to give substantial support to the position of appellees. In the case of **Austad v. United States Steel Corporation**, supra, the Court commented:

> Some aid may be derived from a consideration of the purpose which motivated Congress in providing the test of transacting business. In the **Scophony** case, the Supreme Court commented as follows on the effect of 15 U.S.C.A. § 22: "A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then, by retreating or even without retreating to its headquarters defeat or delay the retribution due." 333 U.S. at page 808.

In this case, the working arrangements between the licensed appellees and the licensed distributors they have selected to handle their liquor in St. Louis and vicinity is such that if so disposed they would have as good opportunity to "perpetrate the injuries outlawed" as if they had agents working for them in the area. The case therefore presents the situation the Supreme Court referred to in the **Scophony** case where the venue for suit against such foreign corporations is in the district where it is charged they have violated the Act.

The judgments of dismissal appealed from are reversed and the case remanded for further proceedings in accord with this opinion.

Reversed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 16,157

Harry Brandt, d/b/a University City House of Liquors et al., Appellants,
v.
Renfield Importers, Ltd., a Corporation et al., Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[July 15, 1959.]

Before Gardner, Chief Judge, and Johnsen and Vogel, Circuit Judges.

Gardner, Chief Judge.

This was an action brought by eighteen retail liquor dealers doing business in St. Louis, Missouri, and vicinity against fourteen distillers, distributors, wholesalers or retailers for certain alleged violations of the Sherman Anti-Trust Act, the Clayton Act, and the Robinson-Patman Act. The complaint alleged that the defendants created a monopoly in the retail liquor business in violation of the anti-trust laws; that they had conspired to monopolize and

have monopolized the trade and commerce in said liquors and the retail distribution thereof in St. Louis, Missouri, and vicinity. The complaint also contained allegations as to damages claimed by the individual plaintiffs, for which they prayed judgment, including treble damages in the amount of $1,329,300.00 and costs, including reasonable attorney's fees, and for an injunction restraining the defendants and enjoining them from continuing said alleged violations of the anti-trust laws.

Three of the defendants, to-wit: Renfield Importers, Ltd., James B. Beam Distilling Co., and Julius Wile Sons & Co., Inc., each filed a motion to quash the service of process and to dismiss on the grounds of improper venue and lack of jurisdiction over the person. In resisting these motions plaintiffs contended that the court acquired jurisdiction because these three defendants (now appellees) were "transacting business" in the State of Missouri. The court heard these motions and on the proofs adduced sustained them and entered orders of dismissal as to the three defendants. Each of these orders of dismissal contains recital that:

> "The Court further directs the entry of a final judgment on the claim as to said defendant, which is only one of several claims, and enters this order upon an express determination that there is no just reason for delay and enters this order upon an express direction for the entry of judgment in accordance with Rule 54 (b) of the Rules of Civil Procedure."

From the orders so entered plaintiffs have appealed, seeking reversal on substantially the following grounds. The court erred in holding that the three appellees were not "transacting business" in the Eastern Judicial District of Missouri within the meaning of Sec. 22, Title 15, U. S. C. (Sec. 12 of the Clayton Act) because under the anti-trust laws a corporation is engaged in transacting business for

the purpose of venue, although it is not present by agent carrying on the business, if in fact in the ordinary and usual sense it transacts business therein of any substantial character.

Simultaneously with the filing of their briefs, each appellee filed a motion to dismiss the appeal, with supporting brief, on substantially the following grounds. The order appealed from is not an appealable order in that, (1) the complaint in this case sets forth a single claim and does not set forth multiple claims, (2) the order appealed from does not dispose of the entire matter and is, therefore, not a final judgment, and (3) the order appealed from is not appealable under Rule 54 (b) of the Federal Rules of Civil Procedure because no more than a single claim for relief was presented in this action. These motions to dismiss the appeal were presented and argued by counsel for the respective parties in connection with the issues raised by appellants by their appeal.

Manifestly, if the motions to dismiss the appeal are well-founded, it should not be necessary to consider the merits of appellants' appeal and for that reason we shall first consider these motions.

The complaint charged the fourteen named defendants with combining and conspiring together in restraint of trade and commerce, which alleged restraint, it is charged, resulted in a monopoly. Plaintiffs demanded money judgment for treble damages in the amount of $1,329,300.00, for an injunction against the defendants, restraining and enjoining them from continuing the alleged violations of the Acts, and for costs and attorney's fees. By this complaint all of the fourteen defendants were charged as joint tort-feasors. There was no claim against any single defendant but they were charged with combining and conspiring together to commit the acts alleged to be violative

of the anti-trust laws. The complaint was dismissed as to the appellees, not on the ground that they had not combined and conspired with the other defendants, but because the court had not acquired jurisdiction over them, and the dismissal of the complaint on that ground confessedly would constitute no bar to an action against them on the same cause of action in a court which might acquire jurisdiction by proper service of process. The dismissal of the action as to appellees left undetermined the issues in the case, either as against them or the other defendants. It is a salutary rule, long adhered to by Federal courts, that, except where otherwise provided by statute, a cause of action must be treated as a unit, not triable piecemeal, nor appealable in fragments. **Arnold v. United States for Use of W. B. Guimarin & Co.**, 263 U.S. 427; **Hohorst v. Packet Co.**, 148 U.S. 262; **Standley v. Roberts**, 8 Cir., 59 Fed. 836; **Moss v. Kansas City Life Ins. Co.**, 8 Cir., 96 F.2d 108; **Minnesota Min. & Mfg. Co. v. Technical Tape Corp.**, 7 Cir., 208 F.2d 159; **Hunter v. Federal Life Ins. Co.**, 8 Cir., 167 F.2d 192; **Brandt v. Renfield Importers, Ltd.**, 8 Cir., 216 F.2d 206."

As early as 1894, in **Standley v. Roberts**, supra, the late Judge Walter H. Sanborn, speaking for this Court, said:

> "An order, judgment, or decree which leaves the rights of the parties to the suit affected by it undetermined—one which does not substantially and completely determine the rights of the parties affected by it in that suit—is not reviewable here until a final decision is rendered, nor is an order retaining or dismissing parties defendant, who are charged to be jointly liable to the complainant in the suit, appealable."

This rule has been consistently adhered to by this Court. Thus, in **Moss v. Kansas City Life Ins. Co.**, supra, it is said:

"Considering the rules announced in the above cases, it would seem that the application of the above rule announced in the **Rosenberg, Pesaro** and **Goldey** Cases should be limited to cases in which the void service of process attaches to all of the defendants. So construed, the rule is harmonious with the broad general rule that for an order, decree, or judgment to be final for appeal purposes such must completely dispose of the action."

The decisions of this Court are clearly in harmony with the views of the Supreme Court expressed in **Arnold v. United States for Use of W. B. Guimarin & Co.**, supra, where it is said:

"It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete, that is, final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction."

It is, however, contended by appellants that the orders dismissing the action as to the appellees for want of jurisdiction are appealable because the trial court, pursuant to Rule 54 (b), Federal Rules of Civil Procedure, directed the entry of a final judgment, "• • • upon an express determination that there is no just reason for delay and enters this order upon an express direction for the entry of judgment in accordance with Rule 54 (b) of the Rules of Civil Procedure." It is therefore necessary to consider the provisions of Rule 54 (b), Federal Rules of Civil Procedure. This Rule reads as follows:

"Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action,

whether as a claim, counterclaim, cross-claim, or third party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction any order or other form of decision, however designated, which adjudicates less than all of the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

As has been observed, all of the fourteen defendants named in the action including the appellees were charged with a combination and conspiracy in restraint of trade in violation of the anti-trust laws of the United States. For this alleged violation of the law, plaintiffs sought a single judgment as damages. The rule authorizing appeals is, on its face, limited to one involving multiple claims. There may be said to be multiple parties plaintiff or multiple parties defendant, but there is involved only a single claim for damages alleged to have been suffered by reason of the combined action of the defendants constituting a conspiracy. We are of the view that this action did not involve multiple claims but rather a single claim as disclosed by the complaint. **Sears Roebuck & Co. v. Mackey**, 351 U. S. 427; **Cold Metal Process Co. v. United Engineering & Foundry Co.**, 351 U. S. 445; **Steiner v. Twentieth Century-Fox Film Corp.**, 9 Cir., 220 F. 2d 105; **Carr v. City of Anchorage**, 9 Cir., 235 F. 2d 780; **Luria Bros. & Co. v. Rosenfeld**, 9 Cir., 244 F. 2d 192; **Reagan v. Traders & General Insurance Co.**, 5 Cir., 255 F. 2d 845; **Lee v. Porcelain Patch & Glaze Corp.**, 5 Cir., 240 F. 2d 763; **Meadows v. Greyhound Corp.**, 5 Cir., 235 F. 2d 233; **Nettles**

v. General Accident Fire & Life Assurance Corp., 5 Cir., 234 F. 2d 243; **Hardy v. Bankers Life & Casualty Co.**, 7 Cir., 222 F. 2d 827; **District 65 v. McKague**, 3 Cir., 216 F. 2d 153; **Youpe v. Moses**, D. C. Cir., 213 F. 2d 613. In **Steiner v. Twentieth Century-Fox Film Corp.**, supra, plaintiff sought to recover judgment against seven defendants for alleged violations of the anti-trust laws. The action was dismissed as to six of the defendants and plaintiff sought to appeal as the trial court had certified under Rule 54 (b) that there was no just cause to delay an appeal by plaintiff from the judgments of dismissal. In the course of the opinion as to the appealability of the order of dismissal it is said, inter alia:

> "This judgment is not final. The appeal must therefore be dismissed without a consideration of the merits. Rule 54 (b) at lies only to a case in which multiple claims are asserted by or against one or more parties. In the absence of multiple claims no final judgment can be entered under the Rule."

Construing Rule 54 (b), the Supreme Court in **Sears Roebuck & Co. v. Mackey**, supra, said in part:

> "The amended rule does not apply in a single claim action nor to a multiple claims action in which all of the claims have been finally decided. It is limited expressly to multiple claims actions in which 'one or more but less than all' of the multiple claims have been finally decided and are found otherwise to be ready for appeal."

The inherent nature of the cause of action cannot be changed by a trial court's certification that multiple claims are involved. The mere signing of the formula prescribed by Rule 54 (b) cannot, we think, have the magical effect of transforming a multiple parties action into a multiple claims action. As said in **Gold Seal Co. v. Weeks**, D. C. Cir., 209 F. 2d 802:

"The fact that the motions judge, in the order sought to be reviewed, characterized the same as a final judgment upon a separate claim can not make the order such a judgment or the claim such a claim, if the claim fails to meet the standard of separateness or distinctness required by the law and the judgment fails to meet the standards of finality so required."

The appeal is therefore dismissed without consideration of the merits of appellants' contentions and the cause is remanded to the trial court for further proceedings not inconsistent with this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX.

In the United States District Court,
Eastern District of Missouri,
Eastern Division.

Harry Brandt, d b.a University City House of Liquors et al.,
Plaintiffs,
vs.
Renfield Importers, Ltd., a corporation; James B. Beam Distilling Company, a corporation; and Julius Wile Sons & Co., Inc., a corporation,
Defendants.
No. 57 C 587 (2).

Harper, Judge.

This is an action for treble damages brought under the acts of Congress commonly known as the Sherman Anti-Trust Act, the Clayton Act, and the Robinson-Patman Act.

Defendants, Renfield Importers, Ltd., James B. Beam Distilling Co., and Julius Wile Sons & Co., Inc., have filed motions to quash service, or in the alternative, to dismiss for lack of venue and jurisdiction. The basic issue raised by these motions is venue.

Section 12 of the Clayton Act, 15 U. S. C. A., Sec. 22, provides:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but

also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

It is conceded that movants are not inhabitants of this district nor can they be "found" here. The question then is: Are the defendants transacting business within this district so as to be subject to suit here under the section above cited?

The factual situation with respect to each of the movants has been set out in affidavits of the officers and employees of movants. With exceptions, to be pointed out later, the contacts of each movant with this district are basically similar. Their sales are made only to independent distributors, each of the movants selling to only two distributors in this district. None of the movants maintain offices here. Movants do not actively solicit sales in the district, but rather fill orders transmitted to their respective home offices. Renfield Importers has no agents who visit the district, but both James B. Beam and Julius Wile Sons & Co. do. Beam employs a "detail man" who visits both distributors and retailers in this district. His function is promotional in nature, and he does not solicit orders or make sales. One of Beam's vice-presidents supervises sales in this district. He visits the district "at irregular intervals which average once every other month." Julius Wile Sons has an employee who visits distributors and retailers in this district, as well as in several other states. Approximately 50% of his time is spent in the Eastern District of Missouri. Only James B. Beam maintains a bank account in this district. The amount of business done in this district by each of the movants is small in comparison to its total sales.

As was pointed out in Abrams v. Bendix Home Appliances, 96 F. Supp. 3, l. c. 5:

"In cases of this type precedents do not necessarily control and each case must be governed by its own peculiar set of facts."

The landmark case interpreting the section in question here is Eastman Co. v. Southern Photo Co., 273 U. S. 359. The facts in the Eastman case were that, l. c. 374:

"* * * the defendant, in a continuous course of business, was engaged, not only in selling and shipping its goods to dealers within the Georgia district, but also in soliciting orders therein through its salesmen and promoting the demand for its goods through its demonstrators for the purpose of increasing its sales. * * *"

The court held that the defendant was transacting business within the district, after defining "transacting business" in the following terms, l. c. 373:

"* * * a corporation is engaged in transacting business in a district, within the meaning of this section, in such sense as to establish the venue of a suit—although not present by agents carrying on business of such character and in such manner that it is 'found' therein and is amenable to local process—if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character."

The next major decision of the Supreme Court of the United States on this question was in United States v. Scophony Corp., 333 U. S. 795. The court held that Scophony was not only "transacting business" of a substantial character in the district, but also was "found" there within the meaning of the service-of-process clause of Section 12 of the Clayton Act. In discussing the Eastman decision, the court held that, l. c. 807:

"The practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' became the test of venue."

The "practical, everyday business or commercial concept" test of venue has been applied in numerous decisions to widely varying factual situations. The results have not always been compatible. This diversity of decision is undoubtedly due to the necessity, as mentioned in the Abrams case, supra, of governing each case by its own peculiar set of facts.

There is, however, in the case at bar a precedent which is not distinguishable on the facts. Plaintiffs previously brought a similar action in this district, being styled Brandt et al. v. Schenley Industries, Inc., et al., No. 875, which is still pending in Judge Moore's court. Among the defendants in that case were two of the movants involved herein, Renfield Importers, Ltd., and James B. Beam Distilling Company. Judge Moore in that case sustained the motions of these two defendants to dismiss because of improper venue. The plaintiffs appealed Judge Moore's ruling as to Renfield Importers, Ltd., and the Court of Appeals dismissed the appeal (216 F. 2d 206) on the basis that the court's order on the motion was not an appealable order.

Since that motion was sustained in 1953 the activities of James B. Beam Distilling Company have remained substantially the same in this district. Renfield Importers, Ltd., has reduced its activities here in that it no longer has agents visiting in this district.

In a similar suit by different plaintiffs against a number of the same defendants herein, being Young et al. v. The American Distilling Company et al., No. 9896, in the Western District of Missouri, Western Division, Judge Duncan in 1955, in passing on a motion similar to the motions before this court, overruled the motion of defendant, Renfield Importers, Ltd., to dismiss, and so we find that two district judges in Missouri are not in agreement on this question.

The trials of anti-trust cases are lengthy and expensive, and the court being of the opinion that the settling of the question of venue might well save much time for the court, and expense, and that the order to be entered by the court on these motions should be so drawn that it would be appealable under Rule 54 (b) of the Federal Rules of Civil Procedure, I am accordingly going to hold that the contacts which movants have with this district are not sufficient to constitute the transaction of business within this district as required by Section 12 of the Clayton Act and the motions to dismiss for lack of venue will be sustained.

Attorneys for the moving defendants will prepare said order to be entered by the court.

Roy W. Harper,
U. S. District Judge.

November 20, 1958.

(Judgment.)

United States Court of Appeals
For the Eighth Circuit.

No. 16359

September Term, 1959.
Wednesday, April 27, 1960.

Harry Brandt, d/b/a University City House of Liquors, Frank G. Viviano, d/b/a Viviano Importing Company, Sam Zucker, d/b/a Case House of Liquors, Louis Fangmeyer, d/b/a Spencer's House of Liquors, Nathan Malnik, d/b/a Malnik Candy & Tobacco Shop, Louis Marcus, d/b/a Lou's News & Tobacco Shop, Caesar Venegoni, d/b/a Caesar's Package Liquors, Maurice Sabbath, d/b/a Sabbath's Liquor Headquarters, Ted's Stores, Inc., a Corporation, George Alexander and Lee A. Conklin, d/b/a St. Ann's Package Liquors and Mound City Package Liquors, Clifford Broughton, d/b/a Broughton's House of Liquors, Albert W. Boudman d/b/a The Seventeen-O-One Package Store, Nathan Meyer, d/b/a Hi-Pointe Liquors, Ben Martin, d/b/a Ben Martin Liquor Store, William Sabbath, d/b/a Sabbath Package Liquors, Elmer Saul, d/b/a Saul's Liquors, Alfred Chotin, d/b/a Crown House of Liquors, Paul Koines, d/b/a T and T House of Liquors, Appellants,

vs.

Renfield Importers, Ltd., James B. Beam Distilling Company, a Corporation, and Julius Wile Sons & Co., Inc., a Corporation.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Missouri and the Motion of appellee James B. Beam Distilling Company to dismiss the appeal, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Motion of appellee James B. Beam Distilling Company to dismiss the appeal be, and the same is hereby, denied.

It is further Ordered and Adjudged by this Court that the judgments of dismissal of the said District Court appealed from be, and the same are hereby reversed with costs; and that Harry Brandt, d/b/a University City House of Liquors, Frank G. Viviano, d/b/a Viviano Importing Company, Sam Zucker, d/b/a Case House of Liquors, Louis Fangmeyer, d/b/a Spencer's House of Liquors, Nathan Malnik, d/b/a Malnik Candy & Tobacco Shop, Louis Marcus, d/b/a Lou's News & Tobacco Shop, Caesar Venegoni, d/b/a Caesar's Package Liquors, Maurice Sabbath, d/b/a Sabbath's Liquor Headquarters, Ted's Stores, Inc., a Corporation, George Alexander and Lee A. Conklin, d/b/a St. Ann's Package Liquors and Mound City Package Liquors, Clifford Broughton, d/b/a Broughton's House of Liquors, Albert W. Houdman, d/b/a The Seventeen-O-One Package Store, Nathan Meyer, d/b/a Hi-Pointe Liquors, Ben Martin, d/b/a Ben Martin Liquor Store, William Sabbath, d/b/a Sabbath Package Liquors, Elmer Saul, d/b/a Saul's Liquors, Alfred Chotin, d/b/a Crown House of Liquors, Paul Koines, d/b/a T and T House of Liquors, have and recover against Renfield Importers, Ltd., James B. Beam Distilling Company, a Corporation, and Julius Wile Sons & Co., Inc., a Corporation, the sum of Four Hundred Seventy-four and 36/100 ($474.36) Dollars for their costs in this behalf expended and have execution therefor.

And it is further Ordered that this cause be, and the same is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court this day filed herein.

April 27, 1960.